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In the Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD., ET AL., PETITIONERS

v.

REGAL-BELOIT CORPORATION, ET AL.

UNION PACIFIC RAILROAD COMPANY, PETITIONER

v.

REGAL-BELOIT CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The United States will answer the following questions:

1. Whether a forum-selection clause contained in an international "through" bill of lading for the carriage of goods from a non-adjacent foreign country to an inland point in the United States is unenforceable under the Carmack Amendment (Carmack), 49 U.S.C. 11706, 14706, where the through bill was issued by an ocean carrier that transported the goods by sea to a United States port and subcontracted with a rail carrier to conduct the inland portion of the transportation in the United States by railroad.

2. Whether a rail carrier that provides railroad transportation that the Surface Transportation Board has exempted from regulation under 49 U.S.C. 10502 may contract out of Carmack's requirements under 49 U.S.C. 10709.

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INTEREST OF THE UNITED STATES

This case concerns a contract for the transportation of goods from a foreign country, which was performed by sea and rail carriage. The Federal Maritime Commission (FMC) and the Surface Transportation Board (STB) exercise regulatory authority over international maritime shipping and railroad transportation, respectively. The Department of Transportation is responsible for establishing the Nation's overall transportation pol-

icy. And the Department of State supervises the Nation's international commitments.

STATEMENT

A bill of lading is a contractual document that records a common carrier's receipt of goods from the party shipping them and states the terms of carriage. See *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 18-19 (2004) (*Kirby*). This case concerns a "through bill of lading" (through bill)—*i.e.*, a bill of lading issued by a carrier that does not itself intend to deliver the goods to their final destination and, instead, "contract[s] to carry to destination" at least in part "through the agency of other and independent carriers." See *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 187, 196-197 (1911). Multiple federal statutes have long regulated bills of lading in maritime and non-maritime contexts.

1. a. In 1893, Congress enacted the Harter Act, 46 U.S.C. 30701 *et seq.*, to regulate bill-of-lading provisions that had unduly "limit[ed] * * * the liability of [a] vessel and her owners." H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936) (*1936 House Report*). That Act generally requires that water carriers "engaged in the carriage of goods to or from any port in the United States" issue a bill of lading upon request, prohibits certain contract terms affecting the carrier's liability, and establishes defenses to liability. 46 U.S.C. 30702-30706.

The Harter Act served as a model for the Hague Rules of 1921, which were adopted with minor modifications by international convention in 1924 "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Robert C. Herd & Co.* v. *Krawill Mach.*

Corp., 359 U.S. 297, 301 & n.5 (1959); see International Convention for the Unification of Certain Rules Relating to Bills of Lading, *done* Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155. In 1936, Congress implemented the Hague Rules by enacting the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (46 U.S.C. 30701 note).

COGSA requires, *inter alia*, that water carriers "issue to the shipper a bill of lading" with specified contents; "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"; and "exercise due diligence" to provide a seaworthy and properly manned, equipped, and supplied ship. COGSA § 3(1)-(3). COGSA defines carriers' rights and immunities with respect to "liabil[ity] for loss or damage"; prohibits contractual terms "relieving the carrier or the ship from liability for loss or damage" arising from certain forms of negligence; and requires shippers to give carriers notice of any loss or damage within three days of delivery and to bring suit within one year. COGSA §§ 3(6) and (8), 4.

COGSA "appl[ies] to all contracts for carriage of goods by sea * * * between the ports of the United States and ports of foreign countries," from "the time when the goods are loaded on to the time when they are discharged from the ship." COGSA §§ 1(e), 13. COGSA thus partially "supersede[d]" the Harter Act "in respect of foreign commerce by sea," S. Rep. No. 742, 74th Cong., 1st Sess. 5 (1935), but left "any other [applicable] law" operative in foreign commerce regarding "the duties, responsibilities, and liabilities of the ship or carrier" before "the goods are loaded" and "after the time they are discharged from the ship," COGSA § 12, and

left the Harter Act generally operative in domestic commerce. See COGSA § 13; *1936 House Report* 7.

Section 7 of COGSA states that COGSA does not "prevent a carrier or shipper from entering into any agreement * * * as to the responsibility and liability of the carrier or the ship" for loss or damage "prior to the loading on and subsequent to the discharge from the ship." COGSA § 7. Section 7 thus "gives the option of extending [certain COGSA terms] by contract" to cover "the entire period in which [goods] would be under [a carrier's] responsibility, including [a] period of inland transport" by an entity acting as an ocean carrier's agent in through transportation. *Kirby*, 543 U.S. at 29. International through bills thus frequently include what is known as a "Himalaya Clause" to permit "downstream parties expected to take part in the contract's execution [to] benefit from [COGSA's] liability limitations." See *id.* at 20 & n.2.

b. The FMC "regulates ocean shipping between the United States and foreign countries," *Landstar Express Am., Inc.* v. *FMC*, 569 F.3d 493, 494 (D.C. Cir. 2009), under the Shipping Act of 1984, 46 U.S.C. 40101 *et seq.*, which establishes a "regulatory process for the common carriage of goods by water in * * * foreign commerce." 46 U.S.C. 40101(1). The Shipping Act of 1984, *inter alia*, governs "through transportation" between "a United States port or point and a foreign port or point" by a "common carrier" that uses a "vessel operating on the high seas or the Great Lakes" for at least part of a through transportation to or from the United States, if that carrier holds itself out to the public as providing the transportation and "assumes responsibility" for the transportation from the "port or point of receipt" to "the port or point of destination." 46 U.S.C. 40102(6) and

(25). Such carriers must publish the "through rate" for each of their "through transportation route[s]," which must include (but need not separately state) any amount that the carrier pays "to an inland carrier for the inland portion of [the] through transportation." 46 U.S.C. 40102(11) and (24), 40501(a)(1).

2. a. Congress's regulation of land-based bills of lading, like its water-based counterpart, responded to carrier practices in the 19th and early 20th centuries. To avoid liability for damage to goods occurring on others' lines during through transportation, rail carriers adopted the "practice * * * of refusing to make a specific agreement to transport to points beyond [their] own line[s]." *Riverside Mills*, 219 U.S. at 199-200. That practice imposed upon shippers seeking compensation for lost or damaged goods "the difficult, and often impossible, task, of determining on which of the several connecting lines the damage occurred." *Missouri, Kan. & Tex. Ry.* v. *Ward*, 244 U.S. 383, 387 (1917). Carriers additionally employed contractual terms in bills of lading limiting their liability and restricting the time within which shippers could present claims. *Cummins Amendment*, 33 I.C.C. 682, 683, 686-687, 690-691 (1915); H.R. Rep. No. 1341, 63d Cong., 3d Sess. 1-2 (1915).

In 1906, Congress amended the Interstate Commerce Act (ICA), ch. 104, 24 Stat. 379, by enacting the Carmack Amendment (Carmack) to impose on "the initial carrier unity of responsibility for the [entire] transportation," *Ward*, 244 U.S. at 386, when "receiving property for transportation from a point in one State to a point in another State." Carmack, ch. 3591, § 7, 34 Stat. 595. In 1915, Congress extended Carmack to the transportation of property "from any point in the United States to a point in an adjacent foreign country." In

1927, Congress extended liability under Carmack to include not only the initial ("receiving") carrier as under prior law, but also the carrier "delivering" the goods "nearest to the point of destination." See 49 U.S.C. 20(11) (1976). In 1920, 1927, and 1940, Congress further revised Carmack to address circumstances in which property is damaged during transit while "in the custody of a carrier by water," providing that both "the liability of [the water] carrier" and the "liability of the initial or delivering carrier" "shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water." *Ibid.* Carmack is now codified at 49 U.S.C. 11706 and 14706.[1]

Under Carmack, a "rail carrier providing transportation or service subject to the jurisdiction of the [STB] under [Part A of Subtitle IV of Title 49] shall issue a receipt or bill of lading for property it receives for transportation under [Part A]." 49 U.S.C. 11706(a). Both that receiving rail carrier and the carrier that "delivers the property" are "liable to the person entitled to recover under the receipt or bill of lading" for "the actual loss or injury to the property" caused either by "the receiving rail carrier," the "delivering rail carrier," or "another rail carrier over whose line or route the prop-

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[1] Carmack was enacted as Paragraphs 11 and 12 of Section 20 of the ICA. See 49 U.S.C. 20(11) and (12) (1976). Congress extended Carmack to motor carriers (in 1935) and freight forwarders (in 1942) when it brought such transportation under the ICA. See 49 U.S.C. 319, 1013 (1976). In 1978, Congress enacted the relevant portion of Title 49 into positive law and placed Carmack in 49 U.S.C. 10730 and 11707 (1994). In 1995, Carmack's provisions were moved to 49 U.S.C. 11706 (rail carriers) and 14706 (motor carriers, freight forwarders, and water carriers).

erty is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading." *Ibid.*[2]

Carmack provides that a "rail carrier may not limit or be exempt from [such] liability" except as provided in Section 11706(c)(2) or (3), and states that any provision in a "receipt, bill of lading, contract, or rule" that constitutes a "limitation of liability or of the amount of recovery * * * is void." 49 U.S.C. 11706(c)(1). Carmack similarly prohibits a rail carrier from providing by "contract" or otherwise "a period of less than 9 months for filing a claim against it" and "a period of less than 2 years for bringing a civil action." 49 U.S.C. 11706(e). Finally, and of particular significance in this case, Carmack specifies that a "civil action" under Carmack "may only be brought" against a rail carrier in certain federal district courts or state courts. 49 U.S.C. 11706(d)(2).

b. The STB, which replaced the Interstate Commerce Commission (ICC) in 1996, regulates "rail carriers" under Part A of Subtitle IV of Title 49, 49 U.S.C. 10101-11908. See 49 U.S.C. 10501-10502. Regulated rail carriers must, *inter alia*, provide transportation subject to STB Part-A jurisdiction "on reasonable request" at reasonable rates (to the extent required by 49 U.S.C. 10707(b)) and reasonable terms. 49 U.S.C. 10702, 11101(a) and (e). However, "rail carriers providing transportation subject to [Part-A] jurisdiction" are sepa-

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[2] If a shipper proves a *prima facie* case under Carmack by showing that the initial carrier received the property "in good condition," carriers have limited defenses to liability. *Missouri Pac. R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 137-138 (1964). If the receiving or the delivering carrier is held liable, it is "entitled to recover from the rail carrier over whose line or route the loss or injury occurred." 49 U.S.C. 11706(b).

rately authorized to enter into contracts to provide rail services. 49 U.S.C. 10709(a). "A contract that is authorized by [Section 10709], and transportation under such contract," are "not subject to [Part A]," and a contracting party "shall have no duty in connection with the services provided under the contract other than those duties specified by * * * the contract." 49 U.S.C. 10709(b) and (c)(1). This provision effectively allows a carrier and shipper to avoid regulation (including Carmack) by contractual agreement.

In addition, the STB may exempt a rail carrier or a type of transportation or service from "the application in whole or in part of" Part A of Subtitle IV. 49 U.S.C. 10502(a). That authority specifically includes the power to "exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement." 49 U.S.C. 10502(f). Invoking that authority, the agency "exempt[ed] from the requirements" of Part A any trailer-on-flatcar and container-on-flatcar service provided by a rail carrier "as part of a continuous intermodal freight movement." 49 C.F.R. 1090.2. No exemption, however, may "operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [S]ection 11706," *i.e.*, Carmack. 49 U.S.C. 10502(e).

3. a. Respondents are cargo owners that contracted with petitioner Kawasaki Kisen Kaisha, Ltd. (K-Line) for the through transportation of goods from China to destinations in the Midwestern United States. Pet. App. 2a & n.1.[3] K-Line issued through bills of lading to each

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[3] Because the insurer respondents are subrogated to insured cargo owners that contracted with K-Line, we refer to all respondents as if

shipper. Those bills authorized K-Line to subcontract the carriage "on any terms whatsoever"; designated COGSA as the law governing the carriers' responsibility during the "entire" carriage; and included a Himalaya Clause permitting each subcontractor to "have the benefit of all provisions" of each bill. *Id.* at 2a, 6a-7a. Each bill also stated that "any action [under the bill] or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction [the shipper] irrevocably consents." *Id.* at 5a.

K-Line used its own ocean vessel to transport respondents' goods from China to Long Beach, California, and, through its United States agent, subcontracted with petitioner Union Pacific Railroad for inland transportation to the ultimate destinations. Pet. App. 3a. It is undisputed that the rail transportation had been exempted from Part-A regulation under the exemption for continuous intermodal freight movement. *Id.* at 27a-28a. The contract between K-Line and Union Pacific incorporated terms from Union Pacific's "Master Intermodal Transportation Agreement" (MITA), including a provision stating that the contract was "made under 49 U.S.C. § 10709." *Id.* at 7a.

b. Respondents filed separate lawsuits in state court, alleging that their property was damaged in a train derailment while en route to the Midwest. Pet. App. 7a. The lawsuits were removed to district court, which dismissed the actions based on the Tokyo forum-selection clause in each through bill. *Id.* at 36a-47a.

c. The Ninth Circuit reversed and remanded. Pet. App. 1a-35a. The court first held that Carmack, rather

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they are cargo owners. All references to "Pet. App." are to the petition appendix in No. 08-1553.

than COGSA, governed K-Line's bills of lading. *Id.* at 11a-26a. It reasoned that, although Carmack "[b]y its terms" applies to a "rail carrier providing transportation or service subject to the [STB's Part-A] jurisdiction," an "ocean carrier" such as K-Line may qualify as a "rail carrier." *Id.* at 12a-13a, 16a (quoting 49 U.S.C. 11706(a)).

The court further held that Carmack applies to the inland portion of import shipments from a foreign country on a through bill of lading issued overseas. Pet. App. 17a-19a. Relying on Ninth Circuit precedent, the court found "Carmack's reach [to be] coextensive with the [STB's] jurisdiction." *Id.* at 18a. That conclusion, the court explained, was not altered by the parties' "contractual extension of COGSA" to the inland portion of the transit. *Id.* at 19a-26a. The court reasoned that while Section 7 of COGSA does not prevent the parties from "extending COGSA's protections" to transportation occurring after goods are discharged from a ship, "other law"—specifically Carmack—might negate such an extension. *Id.* at 21a-22a, 25a; see COGSA § 12.

The court of appeals recognized that Carmack's default rules may be displaced under 49 U.S.C. 10502(e) or 10709. Pet. App. 26a-35a. Section 10502(e) applies to "exempt" railroad transportation like that at issue here and permits rail carriers to "offer[] alternative terms" for such transportation, but the court held that a carrier may do so only if it "first offer[s] the shipper the option of full Carmack protections, presumably at a higher rate." *Id.* at 28a (citation omitted). The court found the record insufficient to determine whether K-Line offered such terms to respondents. *Id.* at 33a-35a.

The court held that K-Line and Union Pacific could not enter into a contract for railroad transportation un-

der Section 10709, which removes such contracts from Part-A requirements. Pet. App. 29a-33a. The court reasoned that Section 10709's contracting provisions apply to "transportation subject to [STB] jurisdiction," 49 U.S.C. 10709(a), and permit "agreement[s] for nonexempt transportation"; but that where, as here, the STB has exempted transportation from Subtitle IV of Title 49, the Subtitle's provisions, "includ[ing] § 10709," are inapplicable. Pet. App. 29a, 32a.

4. In September 2009, the United States became a signatory to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), G.A. Res. 63/122, Annex, U.N. Doc. A/RES/63/122 (Dec. 11, 2008). If ratified by the President with the advice and consent of the Senate, the Rotterdam Rules would alter the liability regime for international through transportation involving the United States when the transportation is partly by sea and partly by land. See *id.* at 8-11 (Arts. 12, 17, 18(d)).

SUMMARY OF ARGUMENT

1. The Ninth Circuit erred in concluding that Carmack displaces the Tokyo forum-selection provision in K-Line's through bills of lading.

a. Carmack does not apply to import carriage from non-adjacent foreign countries. Carmack's purpose is to impose upon the initial or delivering carrier responsibility for damage caused by any connecting carrier that participates in the transportation of that property. Carmack's text expressly limits that liability to transportation within the United States or "*from* a place in the United States *to* a place in an *adjacent* foreign country." 49 U.S.C. 11706(a)(3) (emphasis added). That language

reflects the longstanding limitations on Carmack's scope.

In 1915, Congress expanded Carmack beyond wholly domestic transportation to reach transportation "from" the United States "to" an "adjacent foreign country." See 49 U.S.C. 20(11) (1976). The ICC promptly determined that Carmack did not apply to through carriage to or from *non-adjacent* foreign countries, an interpretation that became a fixture in the Nation's foreign commerce over the ensuing decades. The ICC and the courts similarly long ago concluded that Carmack does not apply to through import transportation originating in even adjacent foreign countries. That limitation reflects concerns for comity with neighboring nations and reflects cooperative practices of the ICC and Canadian regulators before 1915. Carmack's limited scope was not altered when Congress enacted the ICA into positive law, expressly without substantive change, in 1978.

b. In any event, Carmack does not govern the through transportation in this case because Carmack governs transportation by a "rail carrier." K-Line is an ocean carrier, not a rail carrier. A "rail carrier" is a person that "provid[es] common carrier railroad transportation for compensation," 49 U.S.C. 10102(5), by conducting rail operations. An ocean carrier like K-Line that subcontracts with a rail carrier for railroad transportation performs a function fundamentally different from that of the rail carrier actually providing the transportation. The Ninth Circuit's holding that an ocean carrier becomes a "rail carrier" by subcontracting for railroad transportation to complete the inland leg of international through transportation would substantially disrupt the regulatory regime.

c. Because Carmack does not apply to K-Line's bill-of-lading obligations, it does not govern any part of the international through transportation in this case. Carmack's animating purpose is to create in the initial and delivering carriers unity of responsibility for the entire transportation. It does not apply when the initial carrier is an ocean carrier that contracts for through transportation from overseas points to inland destinations. Thus, Carmack does not render unlawful the forum-selection clause in K-Line's bills of lading.

2. If the Court nonetheless concludes that Carmack applies to the international through transportation here, the Ninth Circuit correctly concluded that a rail carrier like Union Pacific engaged in rail transportation exempted from regulation under 49 U.S.C. 10502 cannot be relieved from all Carmack obligations by executing a contract for rail transportation under 49 U.S.C. 10709. Union Pacific cannot rely on Section 10709 in this case because the STB's exemption of intermodal carriage rendered Part A, which includes Section 10709, inapplicable. Union Pacific, however, complied with whatever Carmack obligations it had by offering K-Line the option of Carmack-compliant terms. For that reason as well, the Ninth Circuit's judgment should be reversed.

ARGUMENT

I. THE CARMACK AMENDMENT DOES NOT PRECLUDE ENFORCEMENT OF THE FORUM-SELECTION CLAUSE IN K-LINE'S THROUGH BILLS OF LADING

A. Carmack Does Not Apply Either To Carriage Between The United States And Non-Adjacent Foreign Countries Or To Imports From Any Foreign Country

Carmack's current text reflects the longstanding limitations on Carmack's scope. Congress initially ap-

plied Carmack to transportation between points within the United States—*i.e.*, wholly interstate transportation. In 1915, Congress enacted a limited extension of Carmack into foreign commerce, applying it to common carriers "subject to the provisions of [the ICA] receiving property for transportation * * * *from* any point in the United States *to* a point in an *adjacent* foreign country." 49 U.S.C. 20(11) (1976) (emphasis added); Act of Mar. 4, 1915, ch. 176, § 1, 38 Stat. 1197. That text plainly excluded both carriage between points in the United States and *non*-adjacent foreign countries and imports from all foreign countries. The ICC and courts have long recognized those restrictions, and Congress has not since altered Carmack's geographic reach.

1. a. Two months after Congress amended Carmack in 1915, the ICC concluded that Carmack's text demonstrated that it did not apply to "export and import shipments to and from foreign countries not adjacent to the United States." *Cummins Amendment*, 33 I.C.C. 682, 693 (1915). The Commission carried that interpretation forward in 1919, when it "prescribed uniform forms of bills of lading" for rail carriers. See *Illinois Steel Co.* v. *Baltimore & Ohio R.R.*, 320 U.S. 508, 509-510 (1944) (citing *Bills of Lading*, 52 I.C.C. 671 (1919)). In addition to prescribing a uniform domestic through bill, the ICC prescribed a uniform "through bill[] of lading" for regulated carriers that joined with ocean carriers in conducting export through transportation "to nonadjacent foreign countries." *Bills of Lading*, 52 I.C.C. at 726-727.[4]

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[4] The "through bill of lading" was actually a "divisible bill" constituting a rail-carrier bill for carriage to the port (which was "not a contract * * * for shipment beyond") and an ocean-carrier bill for carriage from that port. *Great N. Ry.* v. *Sullivan*, 294 U.S. 458, 460-461 n.2 (1935) (citation omitted); see *Bills of Lading*, 52 I.C.C. at 730; cf.

The export bill included a provision limiting each carrier's liability to loss or damage "occurring on its own road or its own water line or its portion of the through route" before the "property has been delivered to the next carrier" during "the inland service to the port of export." *Id.* at 690, 731. The ICC explained that the "essential character" of such inland transportation on an international through route is "that of 'foreign commerce'" and found it "evident" from the statutory text that Congress did not "inten[d] * * * to make [Carmack] applicable to traffic to a nonadjacent foreign country." *Id.* at 683, 729 (citation omitted). The Commission accordingly held that Carmack did not displace the carriers' "common law right" to insist on a liability-limiting contractual provision for their "inland service to the port of export" while en route to "non-adjacent foreign countries." *Id.* at 690, 732.

In the Transportation Act, 1920, ch. 91, § 441, 41 Stat. 497, Congress confirmed the ICC's authority to "prescribe the form of [the] through bill of lading" and established procedures to facilitate export through transportation to overseas foreign countries. See 49 U.S.C. 25 (1934) (repealed 1940); cf. *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920). Consistent with the ICC's order, Congress also directed that no rail carrier shall "be liable [for] * * * the shipment after its delivery to the vessel." 49 U.S.C. 25(4) (1934) (repealed 1940).

The ICC promptly revised its "through export bill of lading for shipments to nonadjacent foreign countries"; "adhere[d]" to its conclusion that Carmack does not ap-

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Pennsylvania v. *ICC*, 561 F.2d 278, 281-285 (D.C. Cir. 1977) (discussing ICC policy governing international through rates based on combination rates for inland and ocean carriage from 1906 to 1976).

ply to the inland portion of such shipments; and prescribed a uniform through bill which included the same provision limiting a carrier's liability to loss or damage "occurring on * * * its portion of the [inland] through route" to the port of export. *Export Bill of Lading*, 64 I.C.C. 347, 351, 354 (1921); *id.* App. D (Pt. I, § 2(b)). That uniform bill of lading was required for use in the United States for the ensuing four decades, and its premise that Carmack did not apply to the inland leg of through transportation to non-adjacent foreign countries thus became a fixture in the Nation's foreign commerce. See 49 C.F.R. 31.4, 31.6 (1963); 49 C.F.R. 31.13 (1938) (uniform export bill). Although the ICC in 1966 rescinded the regulation that made use of its uniform export bill mandatory, see 31 Fed. Reg. 14,945 (1966), the ICC did not alter its interpretation of Carmack reflected in the uniform bill.[5]

Like the ICC, this Court concluded that Carmack "does not apply" to "bills of lading affecting liability of railroads for loss of property" during "an interstate in-

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[5] The ICC's uniform "domestic" bill of lading remained applicable to interstate carriage and export carriage "to points in adjacent foreign countries," *Domestic Bill of Lading & Live Stock Contract*, 64 I.C.C. 357, 364 (1921), and did not contain provisions limiting carrier liability in a manner prohibited by Carmack, *Bills of Lading*, 52 I.C.C. at 708-711. See 49 C.F.R. 1035.1(c) (1992) (prescribing uniform bill when a bill is "required" under ICA § 20, 49 U.S.C. 20 (1976)); 49 C.F.R. 31.1(b) (1938) (same).

In 1993, the ICC revised its domestic-bill-of-lading regulations to "clarify the[ir] terms" and "remove obsolete references." 58 Fed. Reg. 60,797 (1993); see 49 C.F.R. 1035.1(a). The ICC emphasized that this revision does "not affect[]" Carmack's bill-of-lading provisions, which apply to goods carried between United States points or "exported to adjacent foreign countries." *Bills of Lading*, 9 I.C.C.2d 1137, 1139-1140 nn.5-6 (1993) (citing ICC precedent).

land route to a seaport * * * for ocean carriage to a non-adjacent foreign country." *Missouri Pac. R.R.* v. *Porter*, 273 U.S. 341, 345 (1927). That limitation, *Porter* explained, constrained Carmack's reach but did not restrict the ICC's broader jurisdiction to regulate bills of lading (to ensure "just and reasonable" terms) for "all carriers" and "all transportation subject to the Act." *Ibid.* (holding that ICC's authority preempted state law).

b. Carmack has long embodied another restriction on its application: even with respect to adjacent countries, Carmack only applies to transportation *to*, not *from*, such countries.

"For reasons of international comity, regulation of carriers in foreign commerce has often been less stringent than that of carriers in domestic commerce." *Trailer Marine Transp. Corp.* v. *FMC*, 602 F.2d 379, 397 n.77 (D.C. Cir. 1979) (citing *United States* v. *Pennsylvania R.R.*, 323 U.S. 612, 621-622 (1945)). And, although Congress has authority to regulate the issuance of bills of lading in foreign countries and liability of carriers for carriage of property to the United States, see *Knott* v. *Botany Mills*, 179 U.S. 69, 74-75 (1900), Congress decided not to do so in Carmack.

Such an application of authority would risk intruding upon the regulatory prerogatives of neighboring nations, which might similarly attempt to exercise their authority over commerce originating in the United States, all in derogation of the inter-sovereign cooperation that is often essential to productive trade partnerships. Indeed, before Congress extended Carmack to carriage "from" the United States "to" adjacent foreign countries in 1915, the ICC and its Canadian counterpart had developed an "efficient working arrangement" based on

the understanding that Canadian authorities would regulate rates for transportation from Canada to the United States and the ICC would regulate exports from the United States to Canada. See *Heated Car Serv. Regulations*, 50 I.C.C. 620, 622-623 (1918); *International Paper Co.*, 33 I.C.C. 270, 274-275 (1915). That arrangement presumably influenced Congress's choice to honor the regulatory authority of adjacent foreign countries by limiting Carmack's reach in foreign commerce to export traffic.

The Second Circuit in *Sompo* incorrectly concluded that Carmack covers both import and export traffic with foreign countries. See *Sompo Japan Ins. Co. of Am.* v. *Union Pac. R.R.*, 456 F.3d 54, 64-68 (2d Cir. 2006); cf. Pet. App. 18 (citing *Sompo*). *Sompo* reasoned that Carmack's text before its codification in 1978 (see pp. 13-14, *supra*) covered such traffic because that text should be construed in the same way as similar "'from . . . to' language" in Section 1 of the ICA, which *Galveston, Harrisburg, & San Antonio Railway* v. *Woodbury*, 254 U.S. 357 (1920), interpreted as vesting "the ICC [with] jurisdiction over transportation in foreign commerce *regardless* of whether the transportation originated in the United States." 456 F.3d at 65-66. *Sompo* misread *Woodbury*.

Woodbury addressed whether the ICA applied when luggage was lost on the inbound portion of round-trip transportation between Canada and Texas. At the relevant time (1917), Section 1 of the ICA stated that the ICA applied to "any *common carrier* . . . engaged in the transportation of passengers or property . . . from any place in the United States to an adjacent foreign country." *Woodbury*, 254 U.S. at 359 (citation omitted). The Court reasoned that the textual focus on the carrier

meant that the ICA's application turned on "the field of the carrier's operation" and "not the direction of the movement." *Id.* at 359-360. A carrier regulated by the ICA because it is "engaged in transportation by rail *to* an adjacent foreign country," the Court explained, also is normally "engaged in transportation * * * *from* that country to the United States," and, for that reason, tariffs filed pursuant to the ICA governed the carrier's liability notwithstanding that the loss occurred during transportation from an adjacent foreign country. *Ibid.*

Carmack's structure was fundamentally different and more limited. It contained two distinct conditions for its application: The initial carrier had to be "subject to the provisions of [the ICA]," and it had to "receiv[e] property for transportation" (as relevant here) "from any point in the United States to a point in an adjacent foreign country." 49 U.S.C. 20(11) (1976). The first requirement, like *Woodbury*, focused on the type of carrier and its field of operations. But the second turned on the direction of the specific "transportation" at issue. *Woodbury*'s carrier-focused rationale did not speak to the latter inquiry, which unambiguously limited Carmack to export transportation.

The courts that addressed the question before 1978 thus were nearly uniform in concluding that imports did not qualify as transportation "from" the United States "to" an adjacent foreign country under Carmack, and that *Woodbury* did not resolve the question. See *Alwine* v. *Pennsylvania R.R.*, 15 A.2d 507, 511-513 (Pa. Super. Ct. 1940); see also, *e.g.*, *Sklaroff* v. *Pennsylvania R.R.*, 184 F.2d 575, 575 (3d Cir. 1950) (per curiam) (following *Alwine*); *Strachman* v. *Palmer*, 177 F.2d 427, 429 (1st Cir. 1949) (same); *Reider* v. *Thompson*, 176 F.2d 13, 15 (5th Cir. 1949) (same), rev'd on other grounds, 339 U.S.

113 (1950). But see *Goldburg* v. *Delaware, Lackawanna & W. R.R.*, 40 N.Y.S.2d 44, 46-48 (Mun. Ct. 1943). The ICC had likewise long held that Carmack does not govern import carriage "from points in an adjacent foreign country to points in the United States," *Heated Car Serv. Regulations*, 50 I.C.C. at 623.

In *Reider* v. *Thompson*, 339 U.S. 113 (1950), the Court addressed Carmack's application to the land portion of the transit of goods shipped from Argentina to New Orleans by ocean carrier and then by rail from New Orleans to Boston. The Court noted that "[t]here was no through bill of lading from Buenos Aires to Boston"; rather, "[t]he contract for ocean transportation terminated at New Orleans," and there was a "new, separate, and distinct domestic contract of carriage" and distinct domestic bill of lading for the land transportation to Boston. *Id.* at 117. In those circumstances, the Court concluded that the discussion of Carmack in *Porter* did not control, *id.* at 116 n.1, and held that Carmack applied to the land transportation. The Court emphasized, however, that it did "not * * * determine" whether a domestic transportation of goods imported under a "*through* bill of lading" would be subject to Carmack. *Id.* at 117-118 (discussing *Alwine*).

c. In 1978, Congress reenacted the ICA into positive law against the long interpretive history described above. Act of Oct. 17, 1978 (ICA Codification), Pub. L. No. 95-473, § 1, 92 Stat. 1337. Carmack's revised text states in its first sentence that it applies to a rail carrier providing "transportation or service subject to the juris-

diction of" the STB under Part A[6] when the carrier receives property for transportation under Part A. 49 U.S.C. 11706(a). Although that sentence omits the phrase "adjacent foreign country," 49 U.S.C. 20(11) (1976), that omission does not alter the longstanding rule that Carmack does not govern transportation between places in the United States and *non*-adjacent foreign countries or *imports* from any country.

To the contrary, Section 11706(a) as a whole demonstrates that that limitation was retained. Carmack establishes "unity of responsibility for the transportation to destination," *Missouri, Kan. & Tex. Ry.* v. *Ward*, 244 U.S. 383, 386-387 (1917), by making the initial carrier (and now the delivering carrier) liable for damages "caused by it or any other carrier in the course of the transportation." *Northern Pac. Ry.* v. *Wall*, 241 U.S. 87, 92 (1916); accord *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 206-207 (1911). Carmack expressly provides, however, that the receiving and delivering carriers' liability for damage caused by a connecting carrier attaches only to transportation "*in* the United States or *from* a place in the United States *to* a place in an *adjacent* foreign country." 49 U.S.C. 11706(a)(3) (emphases added). That textual limitation, when read in light of Carmack's purpose, reflects Congress's continued intent to restrict Carmack to the carriage of goods between places in the United States and for export to an adjacent foreign country.

Any doubt on this score is dispelled by the terms of the 1978 codification itself. Courts do not "infer[] that Congress, in revising and consolidating the laws, in-

[6] Part-A jurisdiction encompasses certain transportation in the United States "between" a place in "the United States and a place in a foreign country." 49 U.S.C. 10501(a)(1)(B) and (2)(F).

tend[s] to change their effect, unless such intention is clearly expressed." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 135-136 (2008). And here, Congress specifically directed in the ICA codification statute itself that the revised text "may not be construed as making a substantive change in the law[]." ICA Codification § 3(a), 92 Stat. 1466; see *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987).

The legislative history similarly emphasized that the revision "makes no substantive change in the law," explained that courts would construe the "codification statute" accordingly, and concluded that the revision would not "impair the precedent value of earlier judicial decisions and other interpretations." H.R. Rep. No. 1395, 95th Cong., 2d Sess. 9-10, 195-196, 213 (1978); see *id.* at 8 (Law Revision Counsel's explanation that, "[e]ven if the language used in the codification *appears* to make a substantive change, the courts will look to the predecessor statute and legislative history" to interpret the codification).

The Ninth Circuit ignored the text of Section 11706(a)(3) quoted above and the terms of the 1978 codification making clear that it effected no substantive change. See Pet. App. 17a-18a; *Neptune Orient Lines, Ltd.* v. *Burlington N. & Santa Fe Ry.*, 213 F.3d 1118, 1119 (9th Cir. 2000). Even the Second Circuit decision cited by the panel (Pet. App. 18a) recognized that Congress "intended to leave the law substantively unchanged" and implied that the omission of the phrase "*adjacent* foreign country" in the first sentence of Section 11706(a) should not alter Carmack's reach. *Sompo*,

456 F.3d at 64, 68 n.13.[7] Read correctly, in light of its long history, Carmack does not apply to transportation between places in the United States and non-adjacent foreign countries of the kind at issue here.

B. K-Line Is A Water Carrier In Foreign Commerce, Not A "Rail Carrier" Subject To Carmack

Even if Carmack applied to import transportation from non-adjacent foreign countries, K-Line is an ocean common carrier rather than a "rail carrier providing transportation or service subject to the [STB's] jurisdiction" and therefore is not subject to Carmack. 49 U.S.C. 11706(a).

A "rail carrier" is "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5). "Rail carriers" have long been understood as limited to entities that themselves "conduct rail operations" and hold themselves out to the public as providing such transportation. See, *e.g.*, *Association of P&C Dock Longshoremen*, 8 I.C.C.2d 280, 290 & n.21 (1992) (citing cases); see also, *e.g.*, *United States* v. *California*, 297 U.S. 175, 181-183 (1936) (status as common carrier by rail turns on whether entity provides "rail transportation," the "essential elements" of which are "the receipt and transportation, for the public, for hire, of [rail] cars"); *Rexroth Hydraudyne B.V.* v. *Ocean World Lines, Inc.*, 547 F.3d 351, 363-364 (2d Cir. 2008) (discussing cases); *American Orient Express Ry.* v. *STB*, 484 F.3d 554, 556-557 (D.C. Cir. 2007).

That understanding is reflected in the ICA's illustrative definition of "transportation," which "includes"

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[7] *Sompo* nevertheless "f[ou]nd [it]sel[f] [bound" by circuit precedent that failed to address Carmack's original text. 456 F.3d at 68 n.13 (citing *Project Hope* v. *M/V IBN SINA*, 250 F.3d 67, 74-75 (2d Cir. 2001)).

items "related to the movement of passengers or property" (*e.g.*, locomotives, vehicles, vessels) and "services related to that movement." 49 U.S.C. 10102(9). A person providing "railroad transportation" is thus most naturally understood to be an entity that has "some form of direct involvement in the movement of passengers or property" by railroad. *Rexroth*, 547 F.3d at 362.[8]

In contrast, an ocean common carrier that contracts with a connecting rail carrier to carry goods on an inland route "perform[s] a function that is fundamentally different from that of a rail carrier that actually does the transporting." *Rexroth*, 547 F.3d at 362. Indeed, as *Rexroth* explains (*ibid.*), the Ninth Circuit's contrary approach would create tension within the ICA's statutory scheme. The ICA regulates, *inter alia*, transportation by a "freight forwarder," which the ICA defines in pertinent part as "a person holding itself out to the general public (other than as a * * * rail * * * carrier) to provide transportation of property" by using ICA-regulated carriers in the ordinary course to provide "any part of the transportation." 49 U.S.C. 13102(8). If contracting for rail services would transform a freight forwarder into a "rail carrier," a freight forwarder that uses a rail carrier to provide transportation presumably could not hold itself out as something other than a "rail carrier."

The Ninth Circuit found it significant that the STB has jurisdiction over "transportation by a rail carrier" "by railroad and water" when under an "arrangement for a continuous carriage or shipment," 49 U.S.C. 10501(a)(1). See Pet. App. 13a, 16a. That provision,

[8] The ICA's definition of "railroad" includes various items "used by or in connection with a railroad," such as a bridge or intermodal equipment. 49 U.S.C. 10102(6).

however, in fact undermines the court's holding. The current version of this provision gives the STB Part-A jurisdiction only over a "rail carrier" engaged in such transportation. 49 U.S.C. 10501(a)(1). And the prior (pre-1995) version makes clear that a "rail carrier" is indeed only a rail carrier, because it gave the agency jurisdiction over *both* a "rail carrier" and a "water common carrier" when they participated in such a joint transportation arrangement. 49 U.S.C. 10501(a)(1) (1994); see 49 U.S.C. 1(1)(a) (1976); see *ICC* v. *Goodrich Transit Co.*, 224 U.S. 194, 207-209 (1912) (explaining that under the prior version of the statute "carriers by water" were subject to ICA regulation "when engaged in carrying on traffic under joint rates with railroads"); *Trailer Marine Trans. Corp.*, 602 F.2d at 383-386. Indeed, Congress continues to distinguish between rail carriers and water carriers in a variety of contexts. Compare 49 U.S.C. 10703 (requiring regulated "[r]ail carriers" to "establish through routes * * * with water carriers") with 49 U.S.C. 13102(26), 13521(a)(1) and (b), 13701(a)(1)(B) (STB's Part-B jurisdiction over water carriers and through routes).[9]

The Ninth Circuit's holding that an oceangoing "water carrier" is a "rail carrier" subject to STB jurisdiction under 49 U.S.C. 10501(a)(1)(B) would substantially dis-

[9] The distinction between rail and water carriers is longstanding. For instance, after the ICC concluded in 1919 that Carmack prohibited domestic water carriers participating in rail-water through transportation from using bill-of-lading provisions limiting their liability as permitted under maritime law, *Bills of Lading*, 52 I.C.C. at 723-726, Congress amended Carmack to provide that the liability of a "carrier by water" for damage caused "while [property] is in [its] custody" is governed by laws "applicable to transportation by water." Transportation Act, 1920, ch. 91, § 437, 41 Stat. 494 (49 U.S.C. 14706(c)(2)); see 49 U.S.C. 11707(c)(2) (1994).

rupt Congress's regulatory regime. The Shipping Act of 1984 specifically contemplates FMC regulation of ocean carriers that use through routes with rail carriers, see pp. 4-5, *supra*; *Rexroth*, 547 F.3d at 357, and both the ICC and the FMC have determined that an ocean carrier providing international "through transportation with inland carriers" remains solely under the FMC's regulatory authority. See 46 C.F.R. 520.1(a); *Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 883 (1987) (FMC regulates tariffs of ocean carriers providing container service with rail transportation). If an "ocean carrier" is a "rail carrier," as the Ninth Circuit held, the STB's authority would significantly expand and the FMC's continuing authority to regulate water carriers in this through-carriage context would be in doubt, because the STB's jurisdiction over "transportation by rail carriers * * * is exclusive," 49 U.S.C. 10501(b).

C. Carmack Does Not Apply To Union Pacific Because K-Line's Bill Of Lading Governs The Entire Through Transportation

Because Carmack does not apply to K-Line's bill of lading for international through transportation, it imposes no obligation on Union Pacific or any other connecting carrier that subcontracted with K-Line to perform part of that transportation.

Carmack's text reflects that the initial carrier has a duty to issue a single bill of lading that will govern the entire through transportation. It provides that a rail carrier "shall issue a receipt or bill of lading for property it receives for transportation"; specifies that "[t]hat rail carrier" is "liable to the person entitled to recover under *the* receipt or bill of lading"; renders the carrier liable for property damage caused by it, "the delivering

carrier," or "another rail carrier" over whose line the property was transported; and entitles "[*t*]*he* rail carrier issuing *the* receipt or bill of lading" to recover from the carrier causing the loss. 49 U.S.C. 11706(a) and (b) (emphases added).

That focus on "the" bill of lading issued by the receiving rail carrier is also reflected in this Court's decisions, which explain that Carmack "requires the receiving carrier to issue a through bill of lading," *St. Louis, Iron Mountain & S. Ry.* v. *Starbird*, 243 U.S. 592, 595, 604 (1917), and thereby makes "the receiving carrier * * * responsible for the whole carriage," *Ward*, 244 U.S. at 387. Carmack's purpose is "to create in the initial carrier unity of responsibility for the transportation to destination" by treating the carriers participating in that transportation "as one system" in which all connecting carriers "become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier." *Id.* at 386-388; accord *Wall*, 241 U.S. at 92.[10] Although Carmack now also imposes liability on the delivering carrier, its focus remains on the single course of transportation under the single through bill of lading.

It follows that "[t]he bill of lading, required to be issued by the initial carrier * * * , 'governs the entire

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[10] That approach reflected the standard industry practice underlying through transportation whereby "[t]he receiving carrier makes the rate and the route" by selecting "connecting carriers" to build a continuous route to destination. *Riverside Mills*, 219 U.S. at 199. Congress understood that "the initial carrier [would have] a through route connection with the secondary carrier" and, if held liable under Carmack, could easily obtain reimbursement from the carrier responsible for the damage because both of their businesses would depend on continued cooperation. *Id.* at 200-201 (quoting legislative history).

transportation,'" "fixes the obligations of all participating carriers," *Galveston Wharf Co.* v. *Galveston, Harrisburg & San Antonio Ry.*, 285 U.S. 127, 135 (1932) (citation omitted), and "contain[s] the entire contract upon which the responsibilities of the parties rest[]." *Starbird*, 243 U.S. at 597. A "connecting carrier * * * may not vary the terms of the through bill," *Galveston Wharf Co.*, 285 U.S. at 135-136, and will "not become an initial carrier" simply by issuing its own bill "unless the so-called second bill of lading represents the initiation of a new shipment." *Mexican Light & Power Co.* v. *Texas Mexican Ry.*, 331 U.S. 731, 733-734 (1947).

Thus, when an international import shipment is destined for an inland place in the United States, whether Carmack applies on the inland leg of the carriage turns on where the obligation of carriage originated. *Reider*, 339 U.S. at 117. If the international contract of carriage ended at the border such that a new, domestic bill is required for interstate inland carriage, then the inland carriage will constitute a new shipment initiated by a domestic receiving carrier and will be subject to Carmack. See *id.* at 117-118. By contrast, if the carrier's undertaking to transport property to the inland point arose under a through bill issued overseas, Carmack does not apply. See pp. 13-26, *supra*.[11] In this

[11] Several courts of appeals have correctly held Carmack inapplicable to the inland leg of international carriage governed by a through bill of lading for delivery to inland United States destinations. See *Altadis USA, Inc.* v. *Sea Star Line, LLC*, 458 F.3d 1288, 1291-1294 (11th Cir. 2006) (citing Fourth, Sixth, and Seventh Circuit decisions), cert. dismissed, 549 U.S. 1189 (2007). Those courts also suggest that Carmack would apply if a separate, domestic bill governed the inland leg. *Ibid.* But see *Sompo*, 456 F.3d at 61-63. We understand those decisions to indicate correctly that, if transportation under an international bill ends at the border, as in *Reider*, Carmack requires a new bill of lading for

case, K-Line's international through bills of lading were for transportation to inland destinations. Pet. App. 2a, 4a-5a. Carmack therefore has no application to the inland portion of the carriage or to Union Pacific's role as a connecting carrier for that carriage.

Because Carmack does not govern the through transportation in this case, Carmack does not invalidate the parties' forum-selection agreement embodied in K-Line's bills of lading for respondents' shipments. Those bills permissibly adopted COGSA as the law governing liability for the entire carriage, included a Himalaya Clause permitting Union Pacific to benefit from the contract, see *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 29-32 (2004), and included a forum-selection clause of the type valid under COGSA. See *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534, 541 (1995). Both K-Line and Union Pacific therefore are contractually entitled to enforce the terms to which respondents agreed in the through bills, including the Tokyo forum-selection clause. That result reflects the nature of the parties' contract and commerce in this case as "essentially maritime." *Kirby*, 543 U.S. at 24.

II. RESPONDENTS COULD NOT CONTRACT OUT OF CARMACK'S LIABILITY PROVISIONS UNDER 49 U.S.C. 10709

A. If the Court agrees that Carmack does not apply to, and thus could not invalidate the forum-selection clause in, K-Line's bills of lading, the judgment of the court of appeals should be reversed. However, if the Court concludes that Carmack applies to the inland portion of the international through transportation here,

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the subsequent interstate carriage and governs that separate, domestic shipment.

the Ninth Circuit was correct in holding that respondents could not avoid Carmack by executing contracts for railroad services under 49 U.S.C. 10709. Consistent with 49 U.S.C. 10502(e), respondents were required to make Carmack-compliant terms available to the party seeking rail services.

Pursuant to 49 U.S.C. 10502(a) and (f), the STB has "exempt[ed] from the requirements of [Subtitle IV of Title 49]" any trailer-on-flatcar and container-on-flatcar service provided by a rail carrier "as part of a continuous intermodal freight movement." 49 C.F.R. 1090.2. That exemption, however, does not "relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of [Carmack]." 49 U.S.C. 10502(e). Under Section 10502(e), a rail carrier providing exempt transportation must offer the shipper the option of contractual terms for liability and claims consistent with Carmack, presumably at a higher rate, and may enter into a contract with different terms only if the shipper does not select that option. Pet. App. 28a-29a; see *Sompo*, 456 F.3d at 60; cf. *New York, New Haven & Hartford R.R.* v. *Nothnagle*, 346 U.S. 128, 135 (1953).

That requirement to offer Carmack-compliant terms is unaffected by Section 10709 for at least two reasons. First, Section 10502(e) specifies contractual terms that the carrier must offer before a contract for carriage is made, whereas Section 10709 specifies the effect of such a contract after it has been executed. See, *e.g.*, 49 U.S.C. 10709(b) and (c)(1). Nothing in Section 10709 relieves a rail carrier providing exempted transportation of whatever obligation it has to make Carmack-compliant terms available to a shipper.

Second, the STB exemption at issue here, 49 C.F.R. 1090.2, broadly exempts the intermodal rail transportation presently at issue from the application of Part-A requirements (which include Section 10709). When the STB exempts a particular type of traffic under Section 10502, the traffic is, absent an express limitation set forth in the exemption itself, no longer subject to any part of the ICA except as provided in Section 10502(e) (Carmack) and 10502(g) (employee protection). The exemption applicable here for intermodal rail transportation includes no such express limitation with respect to Section 10709. Therefore, Union Pacific could not properly enter into a contract under Section 10709 to relieve it of its obligations under Section 10502(e).[12]

The STB's interpretation of its exemption advances important policy considerations. When a rail carrier offers to provide non-exempt transportation under a Section 10709 contract, the entity seeking to obtain such transportation may choose between a contract that places the transportation outside Part-A regulation and the common-carrier rate and terms set by the carrier in

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[12] Because the STB's exemption renders Section 10709 inapplicable, this case presents no opportunity to consider whether a carrier furnishing exempt transportation is statutorily ineligible to invoke Section 10709, as the Ninth Circuit held, see Pet. App. 29a, 31a-33a, or whether, instead, the STB could modify the scope of its exemption to enable rail carriers to enter into Section 10709 contracts for the transportation of otherwise exempt traffic, so long as they also provide terms for liability consistent with Carmack.

Although the government's petition-stage amicus brief in *Kirby* indicated that Section 10709 contracts could apply to exempted traffic and thereby displace Carmack's "liability rules," U.S. Br. at 11 n.4, 12, *Kirby*, *supra* (No. 02-1028), that portion of the brief involved an ancillary point and did not reflect full consideration of the legal issue now squarely presented in this case.

accordance with Part-A regulation (including Carmack). That option to obtain regulated rates and terms is a significant protection for shippers that would lack sufficient bargaining power in negotiations. Cf. H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 100 (1980).

Section 10502(e), by contrast, applies to transportation that has been exempted from regulation, and the carrier therefore has no obligation to make common-carrier rates and terms available to shippers. But Congress wanted shippers to be able to retain Carmack protections, and therefore imposed on the carrier an obligation to "provide"—to offer—contractual terms for liability and claims that are consistent with Carmack. The STB's exemption ensures that such carriers cannot avoid that obligation under Section 10709. It would, at least, be anomalous "for [Section] 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full Carmack liability" and yet for "[Section] 10709 to permit the *same category of rail contracts* to offer specific rates and terms with no such requirement." Pet. App. 31a-32a (internal quotation marks, ellipses and citation omitted).

B. Union Pacific correctly contends (Br. 44-50) that, if Carmack applies in this context, Union Pacific complied with it by offering Carmack-compliant terms to K-Line. Requiring rail carriers that subcontract to perform the inland leg of international through transportation to locate and offer Carmack terms directly to the shipper would impose an unworkable regime and undermine a significant benefit of through transportation by requiring negotiations between shippers and connecting carriers (like Union Pacific) that function as agents of the initial carrier (K-Line) in performing the carriage. That burdensome consequence of the Ninth Circuit's

ruling simply underscores the conclusion that Carmack has no application to international through carriage like that at issue in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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